FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 22 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

NO. 814

EILEEN MORAN, Administratrix of the Estate of Patrick J. Moran, Deceased, Respondent,

v.

PITTSBURGH-DES MOINES STEEL COMPANY, a Copartnership, JOHN E. JACKSON, and PITTSBURGH-DES MOINES COMPANY, a Corporation, Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CARL E. GLOCK,
747 Union Trust Building,
Pittsburgh, Pennsylvania.
Attorney for Petitioners.

Counsel:
REED, SMITH, SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

INDEX.

	PAGE
Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit..	1
Opinion Below	2
Jurisdictional Statement	2
Questions Presented	2
Preliminary Statement	2
Questions 1 and 2	3
Questions 3, 4 and 5	4
Statement of Matter Involved	5
Events of October 20, 1944	10
Reasons Relied on for the Allowance of the Writ...	14
Conclusion	20
Brief in Support of Petition for Writ of Certiorari..	21
I. The Decision Fails to Apply the Substantive Law of Ohio and Proceeds to Misapply in Substitution Section 385 of the Restatement of Torts	21
Section 385 of the Restatement of Torts Is Misapplied	28
II. The Decision Departs from the Pennsylvania Rule on Burden of Proof and Sufficiency of Evidence Where the Evidence Is Circumstantial and There Are Various Possible Causes of an Accident.....	29

PAGE

III. In View of the Federal Court's Interpretation of the Pennsylvania Law on Sufficiency of Evidence, Proceedings in this Case Should Be Stayed until the Pennsylvania Courts Interpret the Law in a Pending Sister Case 36

IV. The Doctrine of Stare Decisis Requires the Federal Court to Follow the Ohio Law Particularly in a Situation of Ruinous Hardship 38

V. This Petition for Writ of Certiorari Is Not Interlocutory in Substance 39

AUTHORITIES CITED.

Alexander v. Pa. Water Co., 201 Pa. 252, 50 A. 991 (1902) 18, 34

Angel v. Bullington, 330 U.S. 183, 191, 91 L.Ed. 832, 838 28

Ashby v. Philadelphia Transportation Co., 356 Pa. 610 (1947), 52 A. (2d) 578.....18, 34

Ashland v. Marks, 43 O.C.C. 428, 22 O.C.C. N.S. 21, Wayne County Ct. of Appeals (1913).....14, 22

Bailey v. N. W. Ohio Natural Gas Co., 4 O.C.C. 471, Circ. Ct. Lucas County, affirmed without opinion by the Ohio Supreme Ct., 52 O.S. 623, 44 N.E. 1130 (1894) 14, 21

Bottomley v. Bannister, (1932) 1 K.B. 458.....17, 25

Brooks v. Morgan, 331 Pa. 235, 200 A. 81 (1938)..18, 35

Burdick v. Cheadle, 25 Oh. St. 393, 20 Am. Rep. 767 (1875) 14, 22

PAGE

Burger v. Fischer Baking Co., 338 Pa. 110, 12 A. (2d) 14 (1940) 18, 35

Christenson v. Bremer and New England Road Mach. Co., 263 Mass. 129, 160 N.E. 410 (1928) .. 17

Curtin v. Somerset, 140 Pa. 70, 21 A. 244, 12 A.L.R. 322 (1891) 17

Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457, 32 L.R.A. 837 (1896) 17

Donaldson v. Pittsburgh Railways Co., 358 Pa. 33, 55 A. (2d) 759 (1947) 18, 34

Dow Drug Co. v. Nieman, 57 Oh. App. 190, 13 N.E. (2d) 130 (1936), Ct. of App. of Ohio, Hamilton County 15

Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188 (1938) 3

Fidelity Title & Trust Co. v. DuBois Electric Co., 218 F. 60 (1914), 238 F. 129 (1916), 253 F. 987 (1918), 253 U.S. 212, 64 L.Ed. 865 (1920) 16, 23

First Presbyterian Congregation v. Smith, 163 Pa. 561, 30 A. 279 (1894) 17

Fitzmaurice v. Fabian, 147 Pa. 199, 23 A. 444 (1892) 17

Fix v. Pa. Power & Light Co., 346 Pa. 598, 30 A. (2d) 114 (1943) 18, 35

Ford v. Sturgis, 14 F. (2d) 253, 56 App. D.C. 361, Ct. of App. D.C. (1926) 16, 24

Galbraith v. Illinois Steel Co., 133 F. 485, 7 C.C.A. (1904), cert. den. 26 S. Ct. 759, 201 U.S. 643, 50 L.Ed. 902 ..... 16, 23

Gausman v. Pearson Co., 284 Pa. 348, 131 A. 247 (1925) 18, 35

Geare v. Sturgis, 14 F. (2d) 256, Ct. of App. D.C. (1926) 16, 24

PAGE

Gilbride v. Leffel & Co., 37 Ohio Law Abstract 457, 47 N.E. (2d) 1015 (1942), Ct. of App. of Ohio, Clark County 15, 25

Henderson v. National Drug Co., 343 Pa. 601, 23 A. (2d) 743 (1942) 18, 35

Hillsborough Township v. Cromwell, 326 U.S. 620, 628, 90 L.Ed. 358, 365 (1946) 19, 23, 36

Howard v. Redden, 93 Conn. 604, 107 A. 509 (1919) 17

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 85 L.Ed. 1477 (1941) 27

Losee v. Clute, 54 N.Y. 494, 10 Am. Rep. 638 (1873) 17

MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696 (1916) 3, 15

Mayor of Albany v. Cunliff, 2 N.Y. 165, Ct. of App. N.Y. (1849) (leading case) 17

Nash v. Raun, 149 F. (2d) 885, 3 C.C.A. (1945), Goodrich and McLaughlin, C.J.J., and Bard, D.J.; cert. den. 326 U.S. 758, 90 L.Ed. 455 .... 19, 30

Otto v. Bolton & Norris, (1936) 2 K.B. 46, 57 ..... 17, 24

Pfendler v. Speer, 323 Pa. 443, 185 A. 618 (1936) .. 18, 35

P.R.R. Co. v. Chamberlain, 288 U.S. 333, 77 L.Ed. 819 (1933) 19, 35

Ripple v. Mahoning National Bank, 143 O.S. 614, 56 N.E. (2d) 289 (1944) 14, 22

Salliotte v. King Bridge Co., 122 F. 378, 6 C.C.A. (1903), 65 L.R.A. 620, cert. den. 191 U.S. 569, 48 L.Ed. 306 ..... 16, 23

Smith v. P.R.R. Co., 201 Pa. 131 (1902), 50 A. 829.. 17

Stanalonis v. Branch Express Agency, 358 Pa. 426, 57 A. (2d) 866, March 22, 1948 ..... 18, 31

Stauffer v. Railway Express Agency, 355 Pa. 25 (1946), 47 A. (2d) 817 ..... 18, 33

PAGE

Strabler v. Toledo Bridge Co., 11 O.C.D. 87, Circ. Ct. of Lucas County (1900) 14, 21
Stubbs v. Duquesne Light Co., 84 Pa. Super. 1 (1924) 17
Swift v. Tyson, 16 Pet. (41 U.S.) 1, 10 L.Ed. 865.... 27
Thornton v. Dow, 60 Wash. 622, 111 Pac. 899, 32 L.N.S. 968 17
Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919) 17
Vandenbark v. Owens Illinois Glass Co., 311 U.S. 538, 85 L.Ed. 327, 61 S.Ct. 347 (1941)..... 37
West v. Amer. Tel. & Tel. Co., 311 U.S. 223, 85 L.Ed. 139 (1940) 27
White Sewing Machine Co. v. Feisel, 28 Oh. App. 152, 156, 162 N.E. 633, 634 (1927), Ct. of App. of Ohio, Lucas County 15
Williams v. Edward Gillen Dock, Dredge & Const. Co., 258 F. 591, 6 C.C.A. (1919), Westenhaver, D.J. 16, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

NO. .....

EILEEN MORAN, Administratrix of the Estate of Patrick J. Moran, Deceased, Respondent,

v.

PITTSBURGH-DES MOINES STEEL COMPANY, a Copartnership, JOHN E. JACKSON, and PITTSBURGH-DES MOINES COMPANY, a Corporation, Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Pittsburgh-Des Moines Steel Company, a copartnership, John E. Jackson and Pittsburgh-Des Moines Company, a corporation, pray that a writ of certiorari be issued to review the judgment entered in this case on February 26, 1948, by the United States Circuit Court of Appeals for the Third Circuit.

The judgment reversed the judgment of the District Court of the United States for the Western District of Pennsylvania and remanded the cause.

The judgment of the District Court was involuntary dismissal at the close of the plaintiff's evidence under Rule 41(b), on the ground that upon the facts and the law the plaintiff had shown no right to relief.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (by Goodrich, C.J.) is reported in 166 F. (2d) 908, and appears in the Appendix at page 713.

There was no written opinion by the District Court.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended (USCA Title 28, Section 347).

The judgment of the Third Circuit Court of Appeals was entered February 26, 1948.

This application is being presented May 21, 1948.

QUESTIONS PRESENTED.

Preliminary Statement.

This is a negligence suit based on diversity of citizenship requiring the Federal courts to apply the substantive law of Ohio, where the accident happened, and the procedural law of Pennsylvania, where the case was tried.

It was the first to be tried of seventy-eight similar cases against the same defendants demanding damages of $6,085,000.

In 1940 there was a disastrous explosion and fire at the Cleveland plant of the East Ohio Gas Company. Legal representatives of employees who were killed and a few employees who were injured brought suit in Penn-

sylvania against a subcontractor (the defendants) which constructed gas tanks for the plant and turned the completed job over to the Gas Company thirteen months before the accident. The cause of the accident remains unknown, the evidence disclosing various possible causes.

Question 1.

Does the decision of the Third Circuit Court of Appeals violate the Rules of Decision Act† as applied in *Erie R. Co. v. Tompkins**:—

a. In failing to follow the Ohio decisions terminating the liability of a contractor erecting structures upon the land of another upon completion of the work?

b. And in applying instead, for the first time, Section 385 of the Restatement of Torts, which extends to contractors the principles of *MacPherson v. Buick Motor Co.,*** relating to the liability of suppliers of chattels?

Question 2.

Does the decision fail to apply to the facts of the case the Pennsylvania rule on sufficiency of evidence, that where all the evidence is circumstantial and a number of possible causes of the accident appear, the plaintiff has the burden of "individuating" the cause attrib-

---

† Judiciary Act of [Sept. 24] 1789, § 34, Rev Stat § 721, 28 USCA § 725, 8 FCA title 28, § 725.

* *Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L. Ed. 1188 (1938).

** *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F 696 (1916).

utable to the defendant and of excluding other equally probable causes reasonably disclosed by the evidence?

Question 3.

Where the Circuit Court of Appeals can find no "clear harmonized pattern" in the Pennsylvania cases on sufficiency of evidence but nevertheless applies its own interpretation in reversal of the District Court, should a retrial be postponed until the Pennsylvania Supreme Court decides the law on the point in a sister case already tried?*

Question 4.

On principles of *stare decisis* should a Federal court change the course of substantive law in Ohio in litigation of the magnitude of this in which the defendant contractor confronts a series of seventy-eight similar cases?

Question 5.

Should a writ of certiorari be granted where a retrial will not present more clearly the ultimate legal questions involved?

---

* *Foley v. Pittsburgh-Des Moines Steel Co., et al.*, in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 638 January Term, 1946, tried February 16, 1948, to March 23, 1948, now awaiting argument on defendants' motions for judgment notwithstanding the verdict and for new trial.

STATEMENT OF MATTER INVOLVED.

This case arises out of a disastrous explosion and fire in the liquefied natural gas plant of East Ohio Gas Company in Cleveland on October 20, 1944. Many lives were lost and the plant was destroyed. This particular case is the first to be tried of seventy-eight similar negligence actions against the same defendants in which the damages demanded aggregate $6,085,000.

The suit is not against the Gas Company which was in exclusive control and operation of the gas works but against a subcontractor which had built storage tanks for the owner, the last one having been accepted thirteen months before the accident.

All of these suits are on behalf of employees of the Gas Company, sixty-six being by legal representatives of deceased employees and the remaining twelve by employees who survived. The complaints allege numerous common counts of negligence relating to design of the tanks, choice of materials and construction. How the accident happened is not explained.

Half of the plaintiffs are represented by counsel for the plaintiff in the present Moran case. The remaining half are represented by Pittsburgh counsel, who filed suit not only in the District Court of the United States, but concurrently in the Court of Common Pleas of Allegheny County, Pennsylvania. These Pittsburgh attorneys appeared as *amici curiae* before the Third Circuit Court of Appeals, and participated in the argument of this Moran case. Pittsburgh counsel tried their first case (*Foley v. Pittsburgh-Des Moines, supra*) in the Court of Common Pleas of Allegheny County, Pennsylvania. After a six-week trial, during which this Moran decision came

down from the Circuit Court of Appeals, the case was submitted to the jury, which found a verdict of $50,000 for the plaintiff widow. Motions for judgment notwithstanding the verdict and for new trial are awaiting argument. Without doubt the losing party will appeal to the Supreme Court of Pennsylvania.

This petition for writ of certiorari arises from the fact that the accident was in Ohio but that the actions lie in the Federal court in Pennsylvania. The substantive law of Ohio is applicable with respect to the duty to third parties of a contractor who erects a structure on the land of another. The procedural law of Pennsylvania is applicable with respect to the burden of proof and the sufficiency of the evidence. This petition asserts that the Third Circuit Court of Appeals has departed from the law of both States. As to Ohio it goes so far as to ignore settled law and blazes a new trail by applying the principles of *MacPherson v. Buick Motor Co.* to a contractor who erects a structure on the land of another and surrenders it to the owner after test.

The case was tried for five weeks before Judge Wallace S. Gourley and a jury in the District Court of the United States for the Western District of Pennsylvania. At the close of plaintiff's case the Court gave judgment of involuntary dismissal under Rule 41 on the ground that there was insufficient evidence of negligence and proximate cause to submit to the jury; plaintiff did not meet the burden of proof (App. 253 a). No opinion was written.

The plaintiff appealed to the Third Circuit Court of Appeals and argument was had on January 21, 1948, before Judges Maris, Goodrich and O'Connell. On February 26, 1948, a decision came down reversing the judg-

ment of the District Court and remanding the cause for further proceedings not inconsistent with the opinion of Goodrich, C.J.

In brief, the testimony disclosed the following:

The plaintiff is a resident of Cleveland. Her husband, an employee of East Ohio Gas Company, died in the disaster of October 20, 1944. The defendants are Pittsburgh-Des Moines Company, a corporation, which fabricated steel at a plant in Pittsburgh; Pittsburgh-Des Moines Steel Company, a partnership, which erected tanks and other steel structures throughout the country; and John E. Jackson, one of the partners.

East Ohio Gas Company, which serves Cleveland with natural gas, determined to erect a plant for the purpose of liquefying, storing and regasifying natural gas. The liquefaction process reduces 600 units of gas to one unit of liquid, thus permitting storage with economy of space. The process requires the compression of gas to 600 pounds per square inch and then its refrigeration to about 250° below zero Fahrenheit, at which point the gas is in liquid form with a vapor pressure of only 2½ pounds per square inch (596 a). Its weight is 42% that of water and its heat content is less than that of an equal amount of gasoline; it is not inflammable or explosive until vaporized by heating (627 a, 596 a).

East Ohio Gas Company was advised in the plant project by an eminent gas engineer as its technical consultant. He had conducted experimental work in liquefying gas and had built a pilot plant in West Virginia (40 a *et seq.*, 589 a, 598 a-602 a). The Gas Company made a general contract with Gas Machinery Company of Cleveland to erect a three-acre plant, which eventually cost some $2,000,000 (43 a; 424 a). The plant consisted

of extensive compressing and refrigerating mechanisms for liquefying gas, of storage tanks for holding the liquid until needed and of devices for regasifying the liquid as needed. The general contractor worked mainly through subcontractors, among whom was the defendant partnership, which contracted to erect the storage tanks. The defendants had nothing to do with the construction of the plant as a whole or the liquefaction and regasification devices but only the empty shells of the tanks (545 a, 548 a). These were huge structures, made of steel plates erected on heavy concrete foundations and welded at the site. Three of them were spheres; and #4 was a cylinder 70 feet in diameter and 43 feet in height.

Through its technical consultant the Gas Company participated in the design of the tanks (50 a, 598 a), selected the type of steel (42 a, 603 a) accepted the drawings and specifications, observed and inspected during construction and participated in tests before acceptance (598 a, 623 a). Its technical staff of engineers was in constant attendance, observing and inspecting the entire course of construction, and its consultant was kept fully informed 556 a, 589 a. The Gas Company secured all the necessary building permits (417 a). Tests of steel for the cylinder showed results equivalent to the tests for the steel in the spheres which had been ordered by the Gas Company (483 a, 484 a, 684 a). For the cylinder the Gas Company secured an independent test of the steel (653 a). The general contractor and the Gas Company participated in selecting and ordering various materials (683 a). During construction of the cylinder, various changes were made at the request of the Gas Company (417 a, 418 a, 523 a), which did some of the work on the tank itself.

In being tested the tanks were subjected to a greater weight of contents and a greater vapor pressure than they would be required to meet in regular commercial use, and were found leakproof. An independent crew of Gas Company workmen conducted a satisfactory leak test of the cylinder (437 a-442 a, 516 a, 535 a, 537 a, 527 a, 565 a). The tanks met plans and specifications. They were accepted and paid for and thereupon operated and controlled exclusively by the Gas Company in its commercial operations. The plant and three of the tanks were put into operation in February, 1941, and were used for 3¾ years before the accident. The fourth tank was accepted by the Gas Company, put into commercial use on September 24, 1943, and was operated successfully for 13 months before the disaster. The Gas Company was in exclusive possession, operation and control of the tanks and the plant, and the defendants had nothing to do with the operation (523 a, 524 a). It had no continuing contract for maintenance, and no right of entry (685 a). The three spheres cost $173,140, and the cylinder $200,000 (424 a). After its acceptance it was never empty and was filled to maximum capacity at least six times.

During this 13-month period the Gas Company made a number of changes about the tanks and the plant which altered the conditions and the risks which existed when the subcontractor's work on the tank had been completed. It constructed curtain walls and dikes around the base of the tanks, cutting off the circulation of air and constituting closed chambers (431 a, 692 a). An electric air blower was then put in to prevent the formation of ice under the fourth tank (515 a, 488 a). Underground conduits were run from the space thus en-

closed to a covered overflow sump which the Gas Company installed (431 a, 524 a). Texas gas with higher nitrogen content than the contractor was informed would be used was introduced into the plant and the Gas Company worked on new nitrogen removal devices (420 a, 514 a, 460 a, 461a). Additional insulation was filled into the tanks from time to time (521 a).

The Gas Company made constant repairs and replacements about the plant in 1943 and 1944, reinforcing foundations (412 a), changing check valves (412 a), repairing a corroded rupture disk on an ethylene tank (487 a), buying new ethylene to replace loss through leakage (512 a), replacing valves on compressors (431 a), repairing a leak on piping leading to the spheres (486 a), putting fresh insulation on the "ice box" in the liquefaction plant (512 a), repairing stuffing boxes (462 a), cleaning out piping and machinery which became "gummed up" with impurities (432 a, 433 a, 490 a, 499 a) and thawing out frozen valves.

Events of October 20, 1944.

In October the Gas Company undertook to fill all four tanks to the full for winter use and at 2:00 P.M. on October 20, the filling being completed, decided to "top off" and shut down the operation. The operation was complex and required great care since the process was so delicately balanced that if one phase of the operation were improperly managed the entire operation would go awry (445 a, 487 a, 504 a, 531 a). The testimony as to manipulation of the many valves is confused (440 a *et seq.*, 506 a *et seq.*). When the shutdown was almost completed at about 2:40 P.M., from causes not known an explosion occurred in the plant. A rumble like distant

thunder was heard, white vapor was seen, fires broke out, two of the tanks were ruptured and most of the plant was burned and destroyed (146 a, 404 a, 405 a, 528 a, 529 a, 407 a, 408 a-410 a). The cylindrical tank exploded with such violence that both inner and outer shells were shattered into some 2,000 counted fragments which were scattered as far as 300 feet from the site of the tank (678 a).

Of the thirteen men engaged in the shutting down operation, only two operators survived. Approximately 130 persons, most of them employees, were killed.

Following the accident, tanks 1 and 2 were found intact but the plug valves were found open and were closed (677 a, 702 a). The concrete curtain walls about tanks 1 and 2 were found shattered with evidence of explosion under the tanks. The steel cover of the overflow pit was blown apart and likewise the ammonia tank in the liquefaction plant and various couplings in the labyrinth of piping around the plant (679 a). Holes were found in various pipes (469 a).

No witness attempted to state how the accident happened or what caused it. The Plant Superintendent stated he did not know the cause. An investigating committee of scientific men appointed by the Mayor of Cleveland to determine the cause of the disaster, after conducting an extensive investigation reported that it could not determine the exact cause of the disaster (476 a, 467 a-469 a, 472 a-477 a).

The chairman of the committee could not state whether the tank ruptured due to structural weakness or to an external condition or to operations in the general plant system. He was certain that there was a vio-

lent rupture of the tank, whereas the tank was built to contain a maximum vapor pressure of five pounds (93 a, 94 a). Another scientist on the committee testified that the committee could not find any one reason which even might have caused the accident but thought the rupture was caused by an impact of some kind (476 a, 477 a).

Defendant's chief engineer, called by the plaintiff, testified as to various possible causes of the accident in faulty operation of the liquefaction plant (678 a, 683 a). He testified that the set-off may have been an explosion anywhere in the plant communicated to the enclosed space under #4 tank; that excess pressure may have got into the tank through a leaky valve or partially open valve; or that a failure in the vent piping system may have released the pressure on top of the tank causing a bump of liquid.

In plaintiff's case at least nine possible causes of the accident appeared for which defendants could not be responsible:

Improper dropping of safety-relief valve on top of No. 4 (98 a, 472 a).

Improper manipulation among the numerous valves, allowing excess gas or liquid to enter the tanks (93 a-94 a, 442 a-460 a, 465 a, 502 a-512 a, 530 a-533 a).

Failure of a valve through leaking or sticking (412 a, 431 a-432 a, 463 a, 486 a, 488 a, 517 a, 531 a, 680 a).

Failure of piping or equipment in the liquefaction or degasification process, through freezing, defect, corrosion, or wear and tear (417 a, 431 a-432 a,

445 a, 454 a, 462 a, 488 a, 512 a, 517 a, 531 a, 667 a, Exs. OO, PP, QQ.)

Explosion of gas, ammonia or ethylene from leaks in the plant, communicated through duct to space beneath No. 4 (498 a, 512a, 526 a, 680 a).

Failure to remove excess moisture or nitrogen from the natural gas (408 a, 499 a-501 a, 514 a, 680 a).

Failure in the vent piping system so as to release 2½ pound pressure in No. 4 and allow bumping of roof (452 a-453 a, 704 a-705 a).

Lack of proper coordination in timing the various complicated moves necessary to shut down filling operations (445 a, 487 a, 504 a, 507 a-508 a, 530 a, 531 a).

Omission of pressure relief device between expansion valve and tanks, permitting surge of pressure causing a bump (95 a).

The testimony did not attempt to eliminate or exclude these possible causes reasonably suggested by the evidence.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision violates the Rules of Decision Act in refusing to follow the substantive law of Ohio:—

1. The decision rejects the substantive law of Ohio —by ignoring it—that when a contractor installs work on the land of another and surrenders it to the owner, the contractor's liability to third persons by reason of the condition of the work is terminated.

Bailey v. N. W. Ohio Natural Gas Co., 4 O.C.C. 471, Circ. Ct. Lucas County, affirmed without opinion by the Ohio Supreme Ct., 52 O.S. 623, 44 N.E. 1130 (1894).

Strabler v. Toledo Bridge Co., 11 O.C.D. 87, Circ. Ct. of Lucas County (1900).

Ashland v. Marks, 43 O.C.C. 428, 22 O.C.C. N.S. 21, Wayne County Ct. of Appeals (1913).

Ohio follows the analogous doctrine as to non-liability of a landlord for injuries to invitee of tenant from condition of premises even when there is a duty to repair.

Burdick v. Cheadle, 26 Oh. St. 393, 20 Am. Rep. 767 (1875).

In 1944 the *Burdick* case was re-examined and its principle reaffirmed:

Ripple v. Mahoning National Bank, 143 O.S. 614, 56 N.E. (2d) 289 (1944).

2. The decision applies instead Section 385 of the Restatement of Torts which assimilates the liability of a contractor erecting a structure on land to the liability

of a supplier of chattels under the doctrine of *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F 696 (1916). In the absence of state decisions supporting the Section, the opinion frankly pioneers by conjecturing that Ohio law would follow an asserted "trend of modern authority."

Section 385 of the Restatement of Torts is found in the Appendix at page 724, footnote 30.

3. In resorting to Section 385 of the Restatement of Torts the Court applies it incorrectly in that here the structure was inspected and tested before acceptance and the owner changed operating conditions after acceptance.

4. This stretching of Ohio law beyond the decisions of the Ohio Supreme Court relies on dicta in intermediate Ohio courts as indication of a trend.

See opinion, Appendix 722-725.

White Sewing Machine Co. v. Feisel, 28 Oh. App. 152, 156, 162 N.E. 633, 634 (1927), Ct. of App. of Ohio, Lucas County.

Dow Drug Co. v. Nieman, 57 Oh. App. 190, 13 N.E. (2d) 130 (1936), Ct. of App. of Ohio, Hamilton County.

Gilbride v. Leffel & Co., 37 Ohio Law Abstract 457, 47 N.E. (2d) 1015 (1942), Ct. of App. of Ohio, Clark County.

5. In substantive law the decision is in direct conflict with prevailing law as indicated by decisions in the following courts:

(a) Sixth Circuit Court of Appeals, applying Ohio law and also applying Illinois law.

Ohio case—

Williams v. Edward Gillen Dock, Dredge & Const. Co., 258 F. 591, 6 C.C.A. (1919), Westenhaver, D.J.

Illinois case—

Salliotte v. King Bridge Co., 122 F. 378, 6 C.C.A. (1903), 65 L.R.A. 620, cert. den. 191 U.S. 569, 48 L.Ed. 306.

(b) Seventh Circuit Court of Appeals.

Galbraith v. Illinois Steel Co., 133 F. 485, 7 C.C.A. (1904), cert. den. 26 S.Ct. 759, 201 U.S. 643, 50 L.Ed. 902.

(c) Third Circuit Court of Appeals itself, prior to *Erie R. Co. v. Tompkins*, applying Pennsylvania law.

Fidelity Title & Trust Co. v. DuBois Electric Co., 218 F. 60 (1914), 238 F. 129 (1916), 253 F. 987 (1918).

(d) Supreme Court of the United States reviewing the decision of the Third Circuit Court of Appeals in the *DuBois* case just mentioned, which was reversed not on the principle involved but on its application to the facts.

Fidelity Title & Trust Co. v. DuBois Electric Co., 253 U.S. 212, 64 L. Ed. 865 (1920).

(e) Court of Appeals of District of Columbia.

Ford v. Sturgis, 14 F. (2d) 253, 56 App. D.C. 361, Ct. of App. D.C. (1926).

Geare v. Sturgis, 14 F. (2d) 256, Ct. of App. D.C. (1926).

(f) State courts generally.

Curtin v. Somerset, 140 Pa. 70, 21 A. 244, 12 A.L.R. 322 (1891).

Fitzmaurice v. Fabian, 147 Pa. 199, 23 A. 444 (1892).

First Presbyterian Congregation v. Smith, 163 Pa. 561, 30 A. 279 (1894).

Smith v. P.R.R. Co., 201 Pa. 131 (1902), 50 A. 829.

Stubbs v. Duquesne Light Co., 84 Pa. Super. 1 (1924).

Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457, 32 L.R.A. 837 (1896).

Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919).

Mayor of Albany v. Cunliff, 2 N.Y. 165, Ct. of App. N.Y. 1849 (leading case).

Losee v. Clute, 54 N.Y. 494, 10 Am. Rep. 638 (1873).

Howard v. Redden, 93 Conn. 604, 107 A. 509 (1919).

Christenson v. Bremer and New England Road Machinery Co., 263 Mass. 129, 160 N.E. 410 (1928).

Thornton v. Dow, 60 Wash. 622, 111 Pac. 899, 32 L.N.S. 968.

(g) King's Bench.

Otto v. Bolton & Norris, (1936) 2 K.B. 46, 57.
Bottomley v. Bannister, (1932) 1 K.B. 458.

II.

The decision violates the Rules of Decision Act in refusing to follow the procedural law of Pennsylvania.

1. The decision conflicts with the applicable Pennsylvania law as to sufficiency of the evidence in personal injury cases that where all the evidence as to cause is circumstantial, indicating various possible causes, the burden is on the plaintiff to individuate the particular cause attributed to defendant and to exclude the other possible causes reasonably suggested by the evidence.

Alexander v. Pa. Water Co., 201 Pa. 252, 50 A. 991 (1902).

Gausman v. Pearson Co., 284 Pa. 348, 131 A. 247 (1925).

Pfendler v. Speer, 323 Pa. 443, 185 A. 618 (1936).

Brooks v. Morgan, 331 Pa. 235, 200 A. 81 (1938).

Burger v. Fischer Baking Co., 338 Pa. 110, 12 A. (2d) 14 (1940).

Henderson v. National Drug Co., 343 Pa. 601, 23 A. (2d) 743 (1942).

Fix v. Pa. Power & Light Co., 346 Pa. 598, 30 A. (2d) 114 (1943).

Ashby v. Philadelphia Transportation Co., 356 Pa. 610 (1947); 52 A. (2d) 578.

Stauffer v. Railway Express Agency, 355 Pa. 24 (1946), 47 A. (2d) 817.

Donaldson v. Pittsburgh Railways Co., 358 Pa. 33, 55 A. (2d) 759 (1947).

Stanalonis v. Branch Express Agency, 358 Pa. 426, 57 A. (2d) 866, March 22, 1948.

2. The decision conflicts with a recent decision in the Third Circuit Court of Appeals itself applying Pennsylvania law.

> *Nash v. Raun,* 149 F. (2d) 885, 3 C.C.A. (1945), cert. den. 66 S. Ct. 99, 326 U.S. 758, 90 L. Ed. 455.

3. The decision conflicts with general law expressed by the Federal courts before *Erie R. Co. v. Tompkins.*

> *P.R.R. Co. v. Chamberlain,* 288 U.S. 333, 77 L. Ed. 819 (1933), Sutherland.

III.

Inasmuch as the opinion expresses doubt about the clarity and meaning of the Pennsylvania rule as to sufficiency of evidence, further proceedings in the Federal court should be stayed pending final decision by the Pennsylvania courts in a sister case already tried and awaiting argument.

> *Hillsborough Township v. Cromwell,* 326 U.S. 620, 628, 90 L.Ed. 358, 365 (1946).

IV.

On principles of *stare decisis*—particularly where a Federal court is applying state law—the settled common law should not be modified in a case involving ruinous hardship. If changes in the law are to be made, the state courts should be allowed to make them and less onerous situations should be used as the vehicles of change.

V.

On interlocutory grounds the parties should not be put to the expense of a long retrial where the present record clearly presents the ultimate legal questions involved.

Conclusion.

For the foregoing reasons it is respectfully submitted that writ of certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

CARL E. GLOCK,
Attorney for Petitioners.

Of Counsel,
REED, SMITH, SHAW & MCCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. The Decision Fails to Apply the Substantive Law of Ohio and Proceeds to Misapply in Substitution Section 385 of the Restatement of Torts.

The decision of the Third Circuit Court of Appeals ignores the Ohio law—and prevailing law generally—which rules the case. It substitutes in lieu thereof Section 385 of the Restatement of Torts which is not supported by case law in Ohio or elsewhere.

The principle of Ohio law involved is that a contractor installing a structure on the land of another is not liable for personal injuries to third parties after the work is surrendered to the owner even if the contractor's work is defective. This doctrine, based essentially on absence of control by the contractor and the break in proximate causation, is announced in the following Ohio cases:

Bailey v. N. W. Ohio Natural Gas Co., 4 O.C.C. 471, Circ. Ct. Lucas County, affirmed without opinion by the Ohio Supreme Ct., 52 O.S. 623, 44 N.E. 1130 (1894). In this leading case defendant installed a gas system to heat steam boilers in an electric plant. An employee of the plant was injured immediately after completion, in an explosion. Defendant held not liable on the ground that no contractual duty was owed to plaintiff as a third party.

Strabler v. Toledo Bridge Co., 11 O.C.D. 87, Circ. Ct. of Lucas County (1900). Defendant contracted to build

a floor under a scaffold but failed to do so. Verdict was directed for defendant on authority of the *Bailey* case.

Ashland v. Marks, 43 O.C.C. 428, 22 O.C.C. N.S. 21, Wayne County Ct. of Appeals (1913). Defendant gas company installed heating apparatus in an opera house. An explosion occurred two days after completion. Held, no liability, citing *Bailey* case.

Burdick v. Cheadle, 26 Oh. St. 393, 20 Am. Rep. 767 (1875). This leading case announces the analogous principle of non-liability of a lessor for injuries to invitee of tenant even when there is a duty to repair. Defendant lessor had constructed unsafe fixtures in a storeroom, under agreement. Plaintiff invitee, injured by fall of fixtures, was denied recovery from lessor who owed him no duty and had no control of the premises.

This case was re-examined as late as 1944 in the case of *Ripple v. Mahoning National Bank,* 143 O.S. 614, 56 N.E. (2d) 289, and the principle was reaffirmed.

Counsel for petitioner has found no case in Ohio repudiating or modifying the doctrine of the foregoing cases and likewise has found no case in Ohio extending to contractors building structures on the land of another the liability placed by the doctrine of *MacPherson v. Buick Motor Co.* upon manufacturers of chattels. It is submitted that this failure to follow established Ohio law violates the Rules of Decision Act as interpreted in *Erie R. Co. v. Tompkins.*

The decision furthermore is inconsistent with the decision in the Sixth Circuit Court of Appeals applying the law of Ohio in a similar factual situation.

Williams v. Edward Gillen Dock, Dredge & Const. Co., 258 F. 591, 6 C.C.A. (1919). Defendant built a breakwater in Cleveland harbor but upon completion failed to leave a warning light upon it. Held there was no liability upon the contractor thereafter for the drowning of a seaman. The opinion by Judge Westenhaver clearly announces the doctrine of the *Bailey* case.

On a question of local law a Circuit Court of Appeals, in the manner practiced by the Supreme Court of the United States, should pay great deference to the views of judges of the lower Federal courts sitting in the locality "who are familiar with the intricacies and trends of local law and practice."

> *Hillsborough Township v. Cromwell*, 326 U.S. 620, 628, 90 L. Ed. 358, 365 (1946).

The Sixth Circuit Court of Appeals held to the same principle in applying the law of Illinois.

> *Salliotte v. King Bridge Co.*, 122 F. 378, 6 C.C.A. (1903), 65 L.R.A. 620, cert. den. 191 U.S. 569, 48 L. Ed. 306.

The Seventh Circuit Court of Appeals did likewise:

> *Galbraith v. Illinois Steel Co.*, 133 F. 485, 7 C.C.A. (1904), cert. den. 26 S. Ct. 759, 201 U.S. 643, 50 L. Ed. 902.

The present decision of the Third Circuit Court of Appeals is in conflict with its own decision in an earlier case which was reviewed by the Supreme Court of the United States. Although there was a reversal on the application of the law to the facts, the principle of non-liability in absence of control was maintained:

Fidelity Title & Trust Co. v. DuBois Electric Co., 218 F. 60 (1914), 238 F. 129 (1916), 253 F. 987 (1918),

253 U.S. 212, 64 L. Ed. 864 (1920). In this case the defendant strung a political banner on a cable across a highway, fastening one end to a chimney. Wind tore the cable loose and plaintiff was injured. The Supreme Court, while recognizing the principle of termination of liability, found evidence of continuing control.

The decision is inconsistent with clear rulings of the Court of Appeals of the District of Columbia:

Ford v. Sturgis, 14 F. (2d) 253, 56 App. D.C. 361, Ct. of App. D.C. (1926); *Geare v. Sturgis,* 14 F. (2d) 256, Ct. of App. D.C. (1926). The contractor and architect on a Washington theatre were exonerated from liability when the roof fell and injured plaintiff subsequent to completion of work.

The state courts generally follow the doctrine of non-liability of the contractor after completion of the work. A number of citations are given in the petition at page 17.

It is very significant that England follows the same doctrine refusing, after specific consideration of the question, to apply to contractors the liability placed upon manufacturers of chattels under the doctrine of *MacPherson v. Buick Motor Co.*:

Otto v. Bolton & Norris, (1936) 2 K.B. 46, 57. In this case defendants built a house and sold it to Miss Otto. The ceiling fell, damaging the structure and injuring Miss Otto's mother. The daughter was allowed recovery for property damage being in privity of contract, but recovery was denied to the mother. The Court discussed the *MacPherson* case and properly declared that under this doctrine there is a proximate relationship between the vendor manufacturer and the ultimate vendee because of lack of opportunity for inspection and test;

whereas on the installation of structures, with opportunity for inspection, there is a break in causal connection. The same distinction is discussed in *Travis v. Rochester Bridge Co., supra,* p. 17.

Bottomley v. Bannister, (1932) 1 K.B. 458. In this case the builder of a house installed a gas burner without a flue. He was held not liable for the death of occupants by gas poisoning.

The opinion in the present case altogether ignores the foregoing Ohio cases and the doctrine which they follow but applies in lieu thereof Section 385 of the Restatement of Torts which assimilates the liability of contractors erecting structures on land to the liability of manufacturers of chattels under the *MacPherson* doctrine. It adopts the Restatement as the law of Ohio by sidestepping existing law and finding as it were a gap in the Ohio case law although no gap exists. The opinion formulates Ohio law by rationalizing a series of three "steps" which must be taken to reach its result; by declaring that the *MacPherson* doctrine is part of the law of Ohio, that it applies to third parties as well as to purchasers, and, most importantly, that it applies to contractors installing structures as well as to manufacturers selling chattels. No case in point is cited but various cases are referred to as indication of "the trend of modern authority;" Appendix 722-725.

The merits of the Court's reasoning are not argued in this petition for writ of certiorari. Suffice it to observe the following: The Ohio cases are all in courts of intermediate jurisdiction, and in the case mainly relied upon, *Gilbride v. Leffel & Co.,** reference to the

---

* 37 Ohio Law Abstract 457, 47 N.E. (2d) 1015 (1942), Ct. of App. of Ohio, Clark County.

MacPherson doctrine was dictum since judgment went to the defendant for absence of proximate cause. The Ohio cases are all clear chattel cases involving, respectively, an electric cord attachment, an explosive cigar and a marine boiler shipped by a manufacturer to an owner and returned to the manufacturer after the accident. The opinions make clear that Ohio continues to regard the *MacPherson* doctrine not as an independent doctrine but as an exception to the general rule of no liability where there is no privity of contract.

The cases from other jurisdictions cited in the opinion need not be answered at this time since the Federal court should follow the Ohio law.

In attempting to classify as a chattel under the Restatement huge gas tanks fabricated and welded in the field of heavy steel plates, the Court overlooks the Restatement's definition of a chattel:

> "A tangible movable thing is a chattel. This is the only use in which the word chattel is employed in the Restatement of this subject. * * * Any tangible movable thing * * *. The term chattel means any physical object which is capable of manual delivery and which is not the subject matter of real property." Restatement in the Courts, Permanent Edition, 1932-1944, Glossary, page 52.

An explanation of this decision may possibly be found in an article by Judge Goodrich in 27 American Bar Association Journal 547, January 1941, entitled, "Mr. Tompkins States the Law." Judge Goodrich in this article follows the *Tompkins* case to the point of saying that when a Federal judge finds a local decision it governs the case for him "and all he needs to do is apply it, but the surprising thing to discover is *how many gaps there are in the judge-made legal fabric in*

any state." (Emphasis supplied) He goes on to suggest that "the Restatement is sufficiently authoritative to bridge the gap." Can it be that this case afforded him an opportunity to apply this theory—at the expense of blacking out Ohio law?

Petitioners' contention is that there is no gap in the Ohio law and that this decision amounts to a return to *Swift v. Tyson.**

As stated in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477 (1941):

> "The proper function of the * * * federal court is to ascertain what the state law is, not what it ought to be."

As further stated in *West v. Amer. Tel. & Tel. Co.*, 311 U.S. 223, 85 L. Ed. 139 (1940):

> "True, as was intimated in the Erie R. Co. case the highest court of the state is the final arbiter of what is state law. When it has spoken its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. * * * It is the duty (of the federal court) in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from the prior decisions of the federal courts."

While nothing prohibits a Federal court from considering the admirable work of the American Law Insti-

---

* 16 Pet. (41 U.S.) 1, 10 L. Ed. 865.

tute among the available data, it must not do so to the exclusion of the decided cases in the state courts. To do otherwise brings about the very lack of uniformity which *Erie R. Co. v. Tompkins* was intended to correct. As stated by Mr. Justice Frankfurter in *Angel v. Bullington,* 330 U.S. 183, 191, 91 L. Ed. 832, 838:

> "The essence of diversity jurisdiction is that a federal court enforces state law and state policy."

Section 385 of the Restatement of Torts Is Misapplied.

An additional error in the decision of the Third Circuit Court of Appeals is that it makes an erroneous application of the *MacPherson* doctrine to the facts of the present case. A reading of Cardozo's meaty opinion and the comment under Section 395 of the Restatement which asserts the *MacPherson* doctrine, shows that the doctrine is based on the likelihood that "the thing will be used by persons other than the purchaser and *used without new tests.* * * * We are dealing now with the liability of the manufacturer of the finished product who puts it on the market to be used without inspection by his customers." Under the facts of the present case the contractor cooperated with the Gas Company in the design, choice of materials and erection of the job and the Gas Company was advised throughout by engineering experts. The structure was thoroughly inspected and tested before using, was found satisfactory and was thereafter successfully used for over a year. Even if Section 385 of the Restatement should ever become law in its general principle, it should not be applied to a case where there is complete inspection and test by a technically-advised owner.

II. The Decision Departs from the Pennsylvania Rule on Burden of Proof and Sufficiency of Evidence Where the Evidence Is Circumstantial and There Are Various Possible Causes of an Accident.

The opinion of Judge Goodrich departs from a long and well understood line of Pennsylvania cases establishing the burden of proof and the sufficiency of evidence in personal injury cases where the evidence is all circumstantial. In the present case the actual cause of the accident remains unknown. An explosion was heard and a trembling was felt, and after the accident evidences of explosion and fire were visible in various places. No witness attempted to put his finger on the cause.

Under circumstances such as these, Pennsylvania applies prevailing law that a jury may not be allowed to base a verdict on conjecture. The plaintiff has the burden of singling out or individuating the cause attributed to the defendant and of precluding the possibility of injury in any other way. This principle is expressed in numerous Pennsylvania cases down to the present time and is constantly applied by the Pennsylvania courts. It was applied in this case by the District Judge, not long removed from an active trial practice in the Pennsylvania courts.

The Third Circuit Court of Appeals, however, says at App. page 728, in footnote 40:

> "It is difficult to get a clear harmonized pattern out of the numerous Pennsylvania cases on this point. In fact if one could select his cases and ignore those unfavorable to him, he could find authority which

has not been expressly overruled to support any of the following positions:"

There follows a statement of four varying positions and a conclusion that under any of them a Pennsylvania court would permit the case to go to a jury.

This footnote animadversion upon the Pennsylvania law is a departure from the Rules of Decision Act inasmuch as the Pennsylvania rule is well settled and in fact was applied by the Third Circuit Court of Appeals itself as late as 1945. If the Federal court cannot find a harmonized pattern in a long survey of the Pennsylvania cases, it should at least apply the recent pronouncements of the Supreme Court of Pennsylvania and it should not depart from its own previous application of the Pennsylvania rule.

Nash v. Raun, 149 F. (2d) 885, 3 C.C.A. (1945), Goodrich and McLaughlin, C.JJ., and Bard, D.J.; cert. den. 326 U.S. 758, 90 L. Ed. 455. This case involved an automobile collision without testimony of eye witnesses, each side having a different theory of cause based upon the position of the tire marks and the vehicles after the accident. The Court said, page 888:

> "Either theory is logical. Only a skilled physicist by using complicated formulae might explain what actually did happen. Evidence which tends to support two conflicting hypotheses tends to support neither and the circumstantial evidence, as presented, leaves the question of the defendant's speed in a conjectural vacuum. * * *
>
> "The circumstantial evidence presented in the present case is as consistent with the theory that the defendant was not negligent as it is with the

theory he was. If the plaintiff cannot show the possibility of a conclusion of defendant's negligence supported by a clear preponderance of its likelihood, Ott v. Boggs, 219 Pa. 614, 69 A. 61, and excluding other probabilities just as reasonable, Alexander v. Pennsylvania Water Co., 201 Pa. 252, 50 A. 991, the plaintiff should not be permitted to go to the jury. The circumstances must compel the conclusion that the defendant was negligent. Pfendler v. Speer, 323 Pa. 443, 185 A. 618. The jury may not be allowed to guess."

The last case in which the Supreme Court of Pennsylvania applied the principle is *Stanalonis v. Branch Motor Express Co.*, 358 Pa. 426, 57 A. (2d) 866, March 22, 1948. The rear wheels of a trailer ran over a man. Witnesses heard a thud but no one saw the impact. Judgment was for the defendant as a matter of law, the Court saying:

"The conclusion is, nevertheless, irresistible that appellee's negligence is not the only reasonable conclusion justified by the evidence and the verdict of the jury was based upon conjecture and surmise rather than facts established by the testimony.

"Affirmative proof of negligence by circumstantial evidence must be by evidence which precludes possibility of injury in any other way and is such that the only reasonable inference to be deduced therefrom is that the accident was caused by the negligence of the defendant in the manner alleged: Donaldson v. Pittsburgh Railways Co., 358 Pa. 33, 37, 55 A. 2d 759; Stauffer v. Railway Express Agency, Inc., 355 Pa. 24, 29, 47 A. 2d 817, 819. '* * * the evidence must so describe, picture or

visualize what actually happened as to enable one fixed with the responsibility for ascertaining the facts to find that defendant was the culpable party: Skrutski v. Cochran, 341 Pa. 289, 291, 19 A. 2d 106;' Balducci v. Cutler, 354 Pa. 436, 439, 47 A. 2d 643, 644. Conjecture and surmise are not substitutes for proof and a jury's verdict based thereon will be set aside: Stauffer v. Railway Express Agency, Inc., supra. Nor does the presumption that decedent was not negligent support an inference that defendant was negligent. Failure to rebut that presumption does not warrant an inference of negligence. Cf. Rowles v. Evanuik, 350 Pa. 64, 69, 38 A. 2d 255. Proof of the happening of an accident is not proof that one of the parties was negligent: Wenhold v. O'Dea, 338 Pa. 33, 35, 12 A. 2d 115; Sajatovich v. Traction Bus Co., 314 Pa. 569, 572, 172 A. 148.

"The evidence in the instant case does not 'so describe, picture or visualize what actually happened' as to enable a jury to find that appellee was negligent.

* * * * * * *

Certain it is that the evidence of circumstances prior and subsequent to the contact are not such as to satisfy reasonable and well-balanced minds that the accident resulted from the negligence of the defendant. See Rowles v. Evanuik, supra; Pfendler v. Speer, 323 Pa. 443, 185 A. 618; Reardon v. Smith, 298 Pa. 554, 148 A. 860. The record does not present a question of conflicting credibility. It presents only conflicting theories as regards the happening of the accident."

Another recent case in the Supreme Court of Pennsylvania announcing the principle is *Stauffer v. Railway Express Agency,* 355 Pa. 25 (1946), 47 A. (2d) 817. It was claimed that a boy was killed by being struck by a truck. There were no eye witnesses. The Court said at pages 25 and 29:

> "The rules prescribing the measure of proof required to establish negligence have been frequently stated; the difficulty is in their application. It is not enough to show merely that an accident occurred, or that it may have happened from any of several causes, equally probable, for only one of which the defendant would be responsible; a jury cannot be allowed to find a verdict on the basis of a mere guess or conjecture; there must be a description of the facts and circumstances sufficient to justify a reasonable conclusion that the defendant was negligent and thereby caused the accident. Among recent cases enunciating and applying these principles may be cited Skrutski v. Cochran, 341 Pa. 289, 19 A. 2d 106; Houston v. Republican Athletic Association, 343 Pa. 218, 22 A. 2d 715; Martin v. Marateck, 345 Pa. 103, 27 A. 2d 42; Fix v. Pennsylvania Power & Light Co., 346 Pa. 598, 31 A. 2d 114; Liguori, Admr. v. Philadelphia, 351 Pa. 494, 498, 41 A. 2d 563, 564. But, on the other hand, it is not necessary that there be testimony of eye-witnesses; circumstantial evidence may be amply sufficient to prove negligence: Pfendler v. Speer, 323 Pa. 443, 445, 185 A. 618, 619; Grimes v. Yellow Cab Co., 344 Pa. 298, 302, 25 A. 2d 294, 296; Giordano v. Clement Martin, Inc., 347 Pa. 61, 64, 31 A. 2d 504, 506; Rowles v. Evanuik, 350 Pa. 64, 68, 38 A. 2d 255, 257. As was said in Giordano v. Clement Martin, Inc., 347

Pa. 61, 64, 31 A. 2d 504, 506: 'Proofs to a degree of absolute certainty are rarely attainable; it is sufficient that they be such as to satisfy reasonable minds.' Nor does the law require the elimination of every possible cause of the accident other than that on which the plaintiff relies, or of all the causes which the ingenuity of counsel may suggest, but only of such other causes, if any, as are fairly suggested by the evidence: Giordano v. Clement Martin, Inc., 347 Pa. 61, 64, 31 A. 2d 504, 506; Saganowich v. Hachikian, 348 Pa., 313, 316, 35 A. 2d 343, 345; Dunmire v. Fitzgerald, 349 Pa. 511, 514, 37 A. 2d 596, 598; Jones v. Monroe Electric Co., 350 Pa. 539, 542, 39 A. 2d 569, 570, 571. * * *

"It is the burden of the plaintiff to produce evidence of circumstances 'so strong as to preclude the possibility of injury in any other way and provide as the *only* reasonable inference the conclusion' that the death was caused by the negligence of defendant in the manner alleged: Pfendler v. Speer, 323 Pa. 443, 448, 185 A. 618; Houston v. Republican Athletic Association et al., 343 Pa. 218, 220, 22 A. 2d 715".

The foregoing case was cited by the Supreme Court of Pennsylvania in 1947 in *Ashby v. Philadelphia Transportation Co.*, 356 Pa. 610, 52 A. (2d) 578. The principle was applied again in 1947 in *Donaldson v. Pittsburgh Railways Co.*, 358 Pa. 33, 55 A. (2d) 759.

Of the numerous Pennsylvania cases, the following may be cited:

Alexander v. Pa. Water Co., 201 Pa. 252, 50 A. 991 (1902).

Gausman v. Pearson Co., 284 Pa. 348, 131 A. 247 (1925).

Pfendler v. Speer, 323 Pa. 443, 185 A. 618 (1936).

Brooks v. Morgan, 331 Pa. 235, 200 A. 81 (1938).

Burger v. Fischer Baking Co., 338 Pa. 110, 12 A. (2d) 14 (1940).

Henderson v. National Drug Co., 343 Pa. 601, 23 A. (2d) 743 (1942).

Fix v. Pa. Power & Light Co., 346 Pa. 598, 30 A. (2d) 114 (1943).

The Supreme Court of the United States applied the same principle in *P.R.R. Co. v. Chamberlain*, 288 U.S. 333, 77 L. Ed. 819 (1933). There the Court said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. * * * 'When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

The decision of the Third Circuit Court of Appeals conflicts with the foregoing cases and practically amounts to saying that all cases in Pennsylvania should go to the jury so long as a microscope can be focused

upon one cause attributable to a defendant. A reading of the Pennsylvania cases, including those mentioned in the relegated footnote, discloses that the Pennsylvania courts do not thus apply the rule.

It is submitted that the present decision loses sight of the burden of proof and the necessity of eliminating other possible causes. On the facts of the case the plaintiff failed to carry the burden of showing causal connection.

III. In View of the Federal Court's Interpretation of the Pennsylvania Law on Sufficiency of Evidence, Proceedings in This Case Should Be Stayed Until the Pennsylvania Courts Interpret the Law in a Pending Sister Case.

This is an appropriate case for applying the principle that where the Federal court is in doubt about the local law, "the proper procedure is for the Federal court to hold the case until a definite determination of the local law can be made by the state courts."* The opinion of Judge Goodrich frowns upon the Pennsylvania rule of "individuating" causes of injury in cases where all the evidence is circumstantial, relegates the discussion of the rule to a footnote and says it is "difficult to get a clear harmonized pattern" out of the numerous cases, in which he says in effect that authority can be found for almost anything.

If the Federal court can find no harmonized pattern in the cases stating the rule as to sufficiency of evidence,

---

* *Hillsborough Township v. Cromwell,* 326 U.S. 620, 628, 90 L. Ed. 358, 365 (1946).

it is hard for counsel to understand what principle of law was applied by the Court to the facts in this case unless it was some kind of "general law."

There now exists, however, a rare opportunity for determining the Pennsylvania law of the case by reason of the pendency of the sister case just tried in the Court of Common Pleas of Allegheny County. Motions for new trial and for judgment notwithstanding the verdict are pending, raising the very point in issue about the sufficiency of the evidence of negligence to go to the jury, the proofs being practically the same in that case as in the present one. The losing party will undoubtedly appeal to the Supreme Court of Pennsylvania. A decision there will not only restate the Pennsylvania rule but apply it to the facts in issue.

If the District Court should retry this case before a decision is reached by the Supreme Court of Pennsylvania, there is the possibility of that very lack of uniformity which *Erie R. Co. v. Tompkins* was aimed to correct. The District Judge may be caught between Judge Goodrich's discussion of the Pennsylvania law in footnote 40 and a possible contrary decision by the Supreme Court of Pennsylvania. This situation would be similar to that in *Vandenbark v. Owens Illinois Glass Co.*, 311 U.S. 538, 85 L. Ed. 327, 61 S. Ct. 347 (1941), in which state law was reversed pending final decision in the Federal court, requiring a concurring reversal by the Federal court.

Pending decision on this petition for writ of certiorari, the time does not appear to be ripe to petition the Circuit Court of Appeals or the District Court to stay the retrial. The Supreme Court of the United States

might appropriately grant this writ, and then postpone argument until the Supreme Court of Pennsylvania decides the sister case. In the alternative, the Supreme Court of the United States might hear argument in due course. It might thereupon dispose of the case altogether by determining both points in the case, that the contractor's liability had terminated under the law of Ohio, and that in any event the evidence of causal connection was insufficient to submit to the jury under the law of Pennsylvania.

IV. The Doctrine of Stare Decisis Requires the Federal Court to Follow the Ohio Law Particularly in a Situation of Ruinous Hardship.

Apart from *Erie R. Co. v. Tompkins,* the Federal court should be loath to disturb Ohio law in this case on sound principles of *stare decisis.* Where the law has been long established and business interests have acted in accordance with it, retrospective changes should be made with great caution. In this case a small steel fabricating company made a construction contract with a large gas company, finished the job and turned it over to the owner after a satisfactory test. The owner thereupon undertook the operation, filling the tanks with liquid. The contractor no longer had any control of the operation nor a right of entry into the plant. The owner could make such changes as it desired and the contractor, if to be held liable, was at the mercy of the owner. If the contractor had known in advance that it would be subjected to such risk of liability, it would have been in position either to decline the contract or else to attempt to obtain insurance.

In this case, however, the Court has determined that an accident occurring thirteen months after delivery of a structure may be charged to the contractor. Seventy-eight cases are pending involving millions of dollars, an overwhelming prospect for any defendant. This is no occasion in which to establish new law and fix *ex post facto* liability. Deviation from precedent under these circumstances would be unjust. If change must be made, let the courts use as a springboard for new doctrine a case which will not be so costly and let the state court make the shift. The Ohio courts should not consider this an appropriate case in which to change the law. *A fortiori* it does not lie within the functions of a Federal court applying Ohio law to depart from *stare decisis* and at the same time from *Erie R. Co. v. Tompkins.*

V. This Petition for Writ of Certiorari Is Not Interlocutory in Substance.

Although the judgment of the Circuit Court of Appeals merely remands for retrial, the facts of the case as now established sufficiently raise the ultimate legal questions. The fact of completion of the job by the contractor and its surrender to the full control of the owner is not disputed. Likewise it is not controverted that the exact cause of the accident is unknown and that there are a number of possible causes fairly suggested by the evidence. The trial of plaintiff's case alone in the District Court lasted five weeks and in the trial of the second case in the Court of Common Pleas of Allegheny County the presentation of both sides took six weeks. The Court and the parties should not be subjected to a retrial before consideration of the procedural phase of

the case by the Supreme Court of Pennsylvania and of the ultimate questions of law by the Supreme Court of the United States. The law of this whole series of cases will remain uncertain until the Supreme Court has spoken.

Respectfully submitted,

CARL E. GLOCK,
Attorney for Petitioners.

Of Counsel,

REED, SMITH, SHAW & MCCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania.